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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-185

LODGE 76, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO and DISTRICT NO. 10, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION and KEARNEY & TRECKER CORPORATION,

Respondents.

BRIEF OF RESPONDENT, WISCONSIN EMPLOYMENT RELATIONS COMMISSION, IN OPPOSITION

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LODGE 76, INTERNATIONAL ASSOCIATION OF MACHINISTS AND
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WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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KEARNEY & TRECKER CORPORATION,
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BRIEF OF RESPONDENT, WISCONSIN EMPLOYMENT RELATIONS COMMISSION, IN OPPOSITION

OPINIONS BELOW

Petitioners correctly state the relevant opinions below. See their petition, page 2.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition. The commission agrees that this Court has jurisdiction under 28 U.S.C. §1257 (3) and §2101 (c).

QUESTION PRESENTED

Did the court below decide a substantial and important federal question contrary to applicable decisions of this Court when it held that a state does not offend Article VI of the United States Constitution by regulating a peaceful, concerted refusal to work overtime?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are properly referenced in the petition at page 3.

STATEMENT OF THE CASE[1]

Kearney & Trecker Corporation (employer) was party to a collective bargaining agreement with Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO (union) and District No. 10, International Association of Machinists and Aerospace Workers, AFL-CIO (District 10). The agreement terminated June 19, 1971. A second agreement became effective July 23, 1972, although it was executed on August 9, 1972, and contained an expiration date of July 22, 1973.

During negotiations for this second agreement a bargaining impasse developed concerning the work week. The employer wished to have a 40-hour week with a time-and-a-half pay rate for work over 8 hours in a day and 40 hours in a week. The union wished to retain the prior schedule of 37 1/2 hours a week with

[1]Following petitioners' symbols, hereafter "App." refers to petitioners' appendix and "A. App." refers to their appendix in the Wisconsin Supreme Court.

overtime rates applicable for work over 7 1/2 hours a day and 37 1/2 hours in a week.

On March 1, 1972, the employer announced that it was implementing its 40-hour week proposal effective March 12. On March 7 the union membership authorized a strike, and further resolved that no union member would work overtime, overtime being defined as work in excess of 7 1/2 hours a day or 37 1/2 hours a week (A. App. 153, 159). The employer and the union met on March 10 and 11 in unsuccessful attempts to resolve the pending crisis. Despite its March 1 announcement, the employer did not implement its 40-hour week proposal on March 12 or any time thereafter.

On March 16 the union "remind[ed]" its members that even though negotiations were still underway the "policies" voted on by membership "WILL continue in effect until" a new labor agreement was signed (Ex. 13 (R. 79, 160; A.App. 155)).

Prior to March 7 only 5 percent of the employes declined overtime work opportunities (A. App. 154). As many as 354 worked on Saturday, March 4 (Ex. 1 (R. 86, 139-140; A. App. 156)). After the union's March 7 meeting, however, all but three employes refused to work overtime (R. 87-88; A. App. 161-162). The employer suffered substantial damages as a result (A. App. 161-162).

The employer's business is the manufacture of machine tools. Its business affects interstate commerce. Labor management relations between the employer and the union are subject to the National Labor Relations Act, 29 U.S.C. sec. 151 *et seq.* (A. App. 163).

On June 12, 1972, the employer filed with the National Labor Relations Board (NLRB) a charge that the union and District 10 violated sec. 8 (b) (3) of the National Labor Relations Act, 29 U.S.C. sec. 158 (b) (3), by requiring the employes not to work overtime. On June 27, 1972, the NLRB Regional Director refused

to issue a complaint on the ground that the union's conduct was not prohibited by the National Labor Relations Act. The Regional Director added (A. App. 145):

> "* * * Dismissal by this Agency does not necessarily preclude the Charging Party [i.e., the employer] from pursuing its rights under statutes other than the National Labor Relations Act on matters not covered by said Act."

On June 15, 1972, the employer filed a complaint with the Wisconsin Employment Relations Commission (commission). On February 26, 1973, a commission examiner found that the union, but not District 10, had authorized, encouraged and condoned the employes' concerted refusal to work overtime, that the design and effect was to interfere with the employer's production, and that the union had therefore violated sec. 111.06 (2) (h), Wis. Stats., which prohibits a concerted effort to interfere with production except in the case of strikes. The examiner ordered the union to cease and desist from so authorizing, encouraging and condoning and to take certain other affirmative action (App. A-33, 34, 35). The union's federal pre-emption argument was rejected (App. A-34, 44, 45, 46, 47, 48). The commission adopted the examiner's findings, conclusions and order as its own on April 23, 1973 (App. A-22, 23).

The union petitioned the Milwaukee circuit court for review. The commission counter-petitioned for enforcement. Employer intervened. On August 24, 1973, the circuit court entered its memorandum decision rejecting union's federal pre-emption argument (App. A-15-21), and on August 29, 1973, entered its judgment affirming and enforcing the commission's order.

The union appealed to the Wisconsin Supreme Court. The Wisconsin court unanimously affirmed the Milwaukee circuit court and also rejected the union's federal pre-emption argument (App. A-2-14). The union's motion for rehearing was denied without opinion on May 6, 1975.

The union filed and served its petition for a writ of certiorari to the Wisconsin Supreme Court by August 4, 1975.

ARGUMENT

The Court Below Did Not Decide A Substantial And Important Federal Question Contrary To Applicable Decisions Of This Court When It Held That A State Does Not Offend Article VI Of The United States Constitution By Regulating A Peaceful, Concerted Refusal To Work Overtime.

A. The federal question.

The commission agrees there is a federal question.

The commission disagrees with the union's formulation of the question on page 9 of its petition. The question is not whether Congress left the states free to influence the substantive terms to be embodied in a collective bargaining agreement by outlawing the conduct here. Rather, the question is whether the law of federal pre-emption ousts the states of power to regulate the instant conduct which is neither federally protected nor prohibited, to-wit: a peaceful, concerted refusal to work overtime.

B. There is no conflict.

The decision below presents no confrontation between a claimed state power and a competing federal rule. The only conflict is between the lower court's holding and the union's construction of federal law.

The union's construction is incorrect. It says the Wisconsin decision is directly contrary to *Local 20, Teamsters Etc. v. Morton*, 377 U.S. 252, 84 S.Ct. 1253, 12 L.Ed. 280 (1964), and is contrary to the "teachings" of *Garner v. Teamsters C. & H. Union*, 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228 (1953), and *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 80 S.Ct. 419, 4 L.Ed. 2d 454 (1960).

Morton and *Garner* dealt with areas Congress had focused on. In *Morton* damages were awarded against a union based on Ohio secondary boycott law. This Court said, 377 U.S. at 259,260:

> "* * * If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe * * * the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available * * * 'For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.' "

In *Garner* Congress had "taken in hand this particular type of controversy," 346 U.S. at 488. The picketing there was to induce union membership for which Congress had a "detailed prescription of a procedure," 346 U.S. at 499.

In respect to *Morton*, the Wisconsin court noted that this Court had upheld Wisconsin's power to ban intermittent and unannounced work stoppages, or "quickie" strikes, on the ground that "Policing of such conduct is left wholly to the states" in *International Union v. Wisconsin Employ. Rel. Bd.*, 336 U.S. 245, 253, 69 S.Ct. 516, 93 L.Ed. 651 (1949), *reh. denied*, 336 U.S. 970, 69 S.Ct. 935, 93 L.Ed. 1121, hereafter *Briggs and Stratton*. The Wisconsin court then correctly said, App. A-14:

> "In *Morton* the fact of congressional focus showed that the activity was beyond state jurisdiction. Such is not the case here. Unlike the very comprehensive statutory

> treatment of secondary boycotts, Congress has not 'focused upon' partial or 'quickie' strikes. Policing of such conduct is left wholly to the states."

In respect to *Garner*, the Wisconsin court correctly said, A-7:

> "*Garner*, the union says, holds that states cannot regulate peaceful economic weapons left free by federal law. However, *Garner* dealt with an area Congress had 'taken in hand,' namely, inducements to union membership. Therefore, Pennsylvania procedures and processes could not operate. In *Garner*, a national labor act purpose was frustrated by the state action. That is not the situation in the instant case."

The union's response to the Wisconsin court's holding is to retreat and to look to *Insurance Agents*. Petition, p. 11. That case, however, merely held that the NLRB had no power to regulate strike tactics and left untouched the states' power to regulate certain partial strike activity such as that here.

Despite *Briggs and Stratton's* removal of strike tactics from the NLRB's purview, the NLRB in *Insurance Agents* had held certain partial strike tactics to be prohibited as a refusal to bargain. This Court held the NLRB was without jurisdiction to declare such strike tactics prohibited as a refusal to bargain in good faith even if the tactics were unprotected.

> "* * * we must evaluate the claim of the Board to power, under §8 (b) (3), to distinguish among various economic pressure tactics and brand the ones at bar inconsistent with good-faith collective bargaining. We conclude its claim is without foundation" 361 U.S. at 492.
>
> "* * * It may be that the tactics used here deserve condemnation, but this would not justify attempting to pour that condemnation into a vessel not designed to hold it" 361 U.S. at 496.
>
> "* * * We may agree arguendo with the Board that this Court's decision in the Briggs-Stratton case * * *

> establishes that the employee conduct here was not a protected concerted activity. * * * But surely that a union activity is not protected * * * does not mean that it constitutes a refusal to bargain in good faith" 361 U.S. at 492-494.

It does not follow, as the union would have it, that Congress meant for the conduct to be free from state rules. It follows only that the NLRB cannot regulate these tactics as a matter of "good faith" bargaining. This Court did not reverse *Briggs and Stratton,* though the NLRB asked it to do so. Thus, this Court again recognized, as it had earlier in *Garner,*[2] that the NLRB might not be able to regulate conduct though a state could. *Insurance Agents,* therefore, left *Briggs and Stratton* untouched as to whether states can regulate such strike tactics.

The union alternatively asserts that Congress has focused on a concerted refusal to remain on the employer's premises. Petition, pp. 14-15. It cites legislative history for support. The "focus" this Court alluded to in *Garner* and *Morton,* however, were detailed and pervasive enactments of the Congress.

C. There is no special importance to reviewing this decision.

The union raises the spectre that all states might jump on the band wagon to tip the scales of power between labor and management. Petition, p. 15.

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[2]"This is not an instance of injurious conduct which the [NLRB] is without express power to prevent and which therefore either is 'governable by the State or it is entirely ungoverned.' In such cases we have declined to find an implied exclusion of state powers. [*Briggs & Stratton.*]" *Garner, supra,* 346 U.S. at 488.

This Wisconsin decision, however, is a narrow one. First, it relates only to a concerted refusal to work overtime, conduct long held unprotected by the NLRB, see *John S. Swift Company, Inc.,* 124 NLRB No. 46, 44 LRRM 1388 (1959), *enf.* 277 F. 2d 641 (7th Cir. 1960), and the courts, see *C.G. Conn., Ltd. v. N.L.R.B.,* 108 F. 2d 390, 397 (7th Cir. 1939), and *N.L.R.B. v. Kohler,* 220 F. 2d 3, 11 (7th Cir. 1955). Second, the decision does not assert power to be arbiter of all economic weaponry. The Wisconsin court carefully charted its course under *Morton, Garner, Insurance Agents* and *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed. 2d 775 (1959). The commission's examiner, whose decision ultimately was upheld by the Wisconsin court, noted that Wisconsin's statute could not operate in a pre-empted area. App. A-50, note 20.

The union further predicts state invasion of even federally protected conduct. Petition, pp. 16-17. The Wisconsin court, however, went out of its way to show its concern to adhere to all pre-emption rules. App. A-9. Moreover, the union mistakenly says the Wisconsin court drew a "nice" but incorrect distinction between scheduled or requested voluntary overtime and refusals to volunteer for it and indicated that sec. 7 of the NLRA protects overtime bans by unorganized workers but not when they are union-induced.[3]

Finally, by an implicit confession that the Wisconsin court's decision is in harmony with federal law, the union contends that the *Briggs and Stratton* encroachment on peaceful, economic weaponry must be pronounced dead. The erroneous assumption

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[3]The lower court simply noted arguments made in support of similar but different contentions. It decided the issues on another ground, however, to-wit: the controlling weight of the Board's decision in *Prince Lithograph Co.,* 205 NLRB No. 23, 83 LRRM 1654, 1973 CCH par. 25,614 (1973). See App. A-11-13.

is that peaceful, economic weaponry is a talisman to leave union conduct untouched. There are numerous illustrations to set this assumption aside.

First, in the federal sector the whole secondary boycott law aims to determine *which* peaceful, economic weaponry is permitted. See *NLRB v. Denver Bldg. & Constr. T. Council*, 341 U.S. 675, 71 S.Ct. 943, 95 L.Ed. 1284 (1951); *Local 761 v. NLRB*, 366 U.S. 667, 81 S.Ct. 1285, 6 L.Ed. 2d 592 (1961); and *Sailors' Union (Moore Drydock)*, 92 NLRB No. 93, 27 LRRM 1108 (1950). Peaceful, economic pressures to induce work assignments are banned. See *NLRB v. Plasterers' Local Union*, 404 U.S. 116, 92 S.Ct. 360, 30 L.Ed. 2d 312 (1971). Recognitional picketing however peaceful is subject to substantial limitations. See sec. 8 (b) (7), 29 U.S.C. sec. 158 (b) (7); *Dallas Building and Construction Trades Council v. N.L.R.B.*, 396 F. 2d 677 (D.C. Cir. 1968); and *Connell Co. v. Plumbers & Steamfitters*, — U.S. —, 95 S.Ct. 1830, 44 L.Ed. 2d 418 (1975).

Second, in the federal-state area, three decisions of this Court make it crisply certain that the fact that union conduct is peaceful and economic does not *ipso facto* insulate it from state regulation. In *Hanna Mining Co. v. District 2, MEBA*, 382 U.S. 181, 86 S.Ct. 327, 15 L.Ed. 2d 254 (1965), this Court reversed the Wisconsin court's refusal to allow injunctive action in the case of peaceful picketing aimed to organize supervisors. This Court said, 382 U.S. 192-193:

> "Additionally, even if a [secondary boycott] violation were present * * * the Board has established that the workers sought to be organized are outside the regime of the Act. * * * Most importantly, the Board's decision on the supervisory question determines * * * that none of the conduct is arguably protected nor does it fall within some middle range impliedly withdrawn from state control."

In *American Radio Ass'n v. Mobile Steamship Ass'n Inc.*, — U.S. —, 95 S.Ct. 409, 418, 42 L.Ed. 2d 399 (1974), this Court said:

> ". . . [O]ur cases 'established a broad field in which a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy.' "

In *Windward Shipping (London) Ltd. v. American Radio Ass'n*, 415 U.S. 104, 94 S.Ct. 959, 39 L.Ed. 2d 195 (1974), the question was whether states were precluded from enjoining picketing of foreign flag vessels to protest wages paid to foreign crew members. The Texas courts had held that *Garmon's* arguably protected or prohibited test pre-empted. This Court reversed, however, on the ground that Congress did not intend to intrude national labor law into the accommodations of international maritime trade. It follows, this Court said, that Texas could enjoin the picketing. 94 S.Ct. at 966.

In sum, then, the union seeks to expand *Morton*. Its ground is that its conduct is peaceful, economic weaponry. Neither *Morton, Garner*, nor *Insurance Agents*, however, erects such a talismanic rule. Rather, the union must show that Congress has focused on its conduct and subjected it to pervasive regulation. It

has failed. Further, this narrow *Morton* exception to *Garmon*[4] does not abridge *Briggs and Stratton*, itself a narrow holding as to certain partial strike tactics, which upheld Wisconsin's power to act under the very statute applied here.

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[4]The *Garmon* test was subsequently reaffirmed as the primary test for pre-emption in *Amalgamated Ass'n of Street etc. Employees v. Lockridge*, 403 U.S. 274, 291, 91 S.Ct. 1909, 29 L.Ed. 2d 473 (1971), *reh. denied*, 404 U.S. 874, 92 S.Ct. 24, 30 L.Ed. 2d 120:

> " 'When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the * * * Act, or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield. * * *' "

Federalism requires an easy rule:

> "* * * the federal system dictates that this problem be solved with a rule capable of relatively easy application, so that lower courts may largely police themselves in this regard." 403 U.S. at 290.

CONCLUSION

It is respectfully submitted that the union's petition for a writ of certiorari should be denied.

Respectfully submitted,

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